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Tenth report on reservations to treaties

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Addendum

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C. Reservations incompatible with the object and purpose of the treaty

54. "In cases not falling under subparagraphs (a) and (b)", article 19 (c) of the 1969 and 1986 Vienna Conventions prohibits the formulation of reservations incompatible with "the object and purpose of the treaty". This principle is one of the fundamental elements of the flexible system established by the Vienna regime, moderating the "radical relativism"[131] resulting from the pan-American system, which reduces multilateral treaties to a network of bilateral relations,[132] while avoiding the rigidity resulting from the system of unanimity.

55. This concept, which first appeared in the area of reservations in the 1951 advisory opinion of the International Court of Justice,[133] has become increasingly accepted. It is now the pivot between the need to preserve the nature of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States. There is, however, a major difference between the role of the criterion of compatibility with the object and purpose of the treaty, in accordance with the 1951 advisory opinion, on the one hand, and article 19 (c) of the Convention, on the other.[134] In the advisory opinion, it applied equally to the formulation of reservations and to objections:

> "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them."[135]

In the Convention, it is restricted to reservations: article 20 does not restrict the ability of other contracting States to formulate objections.

56. Within those limits, there is no doubt that this criterion of the validity of the formulation of reservations now reflects a rule of customary law which is unchallenged.[136] However, its contents remain vague (2) and there is still some uncertainty as to the consequences of the incompatibility of a reservation with the object and purpose of the treaty (3). Nonetheless, before examining possible

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[131] P. Reuter, op. cit., note 28, p. 73, para. 130. This eminent author applies the expression to the system adopted by the International Court of Justice in its 1951 advisory opinion on *Reservations to the Genocide Convention* (*Reports*, 1951, p.15); the criticism is probably excessive (cf. below, paras. 88-90; cf. also paras. 93 et seq.); however, it applies perfectly well to the pan-American system.

[132] On the pan-American system, cf. the bibliography in P.-H. Imbert, op. cit., note 22, pp. 485-486. In addition, aside from the description by P.-H. Imbert himself (ibid., pp. 33-38): M. M. Whiteman, *Digest of International Law*, Department of State, Washington, D.C., vol. 14, 1970, pp. 141-144 or J. M. Ruda, op. cit., note 17, pp. 115-133.

[133] *I.C.J. Reports*, 1951, pp. 24 and 26.

[134] V. M. Coccia, op. cit., note 34, p. 9; L. Lijnzaad, op. cit., note 84, p. 40; Manuel Rama-Montaldo, "Human Rights Conventions and Reservations to Treaties", *Héctor Gros Espiell* Amicorum Liber, vol. II, Bruylant, Brussels, 1997, pp. 1265-1266 or I. Sinclair, op. cit., note 88, p. 61.

[135] *I.C.J. Reports*, 1951, p. 24.

[136] Cf. the many arguments to that effect given by C. Riquelme Cortado, op. cit., note 27, pp. 138-143. Cf. also the Commission's 1997 preliminary conclusions, in which it reiterated its view that "articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations." (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), *Yearbook ... 1997*, vol. II, part two, p. 57, para. 1).

responses by the Commission to these two central issues, we should begin by determining the types of reservations to which the test of compatibility with the object and purpose of the treaty is applicable (1).

1. Applicability of the criterion of compatibility of a reservation with the object and purpose of the treaty

57. The principle set forth in article 19 (c) of the Vienna Conventions, whereby a reservation incompatible with the object and purpose of the treaty may not be formulated, is of a subsidiary nature since it applies only in cases not covered in article 20, paragraphs 2 and 3, of the Convention[137] and where the treaty itself does not resolve the reservations issue.

58. If it does so, a number of cases must be distinguished. They lead to varying answers to the question of whether the reservations concerned are subject to the test of compatibility with the object and purpose of the treaty. In two of these cases the answer is clearly negative:

- There is no doubt that a reservation expressly prohibited by the treaty cannot be held to be valid on the pretext that it is compatible with the object and purpose of the treaty;[138]
- The same applies to "specified" reservations. Expressly authorized by the treaty, subject to specific conditions, they are automatically valid without having to be accepted by the other contracting States[139] and they are not subject to the test of compatibility with the object and purpose of the treaty.[140] These obvious facts are probably not worthy of mention in separate provisions of the Guide to Practice; they follow directly and inevitably from article 19 (c) of the Vienna Conventions, and it is proposed that the latter should be reproduced in draft guideline 3.1.[141]

59. The same does not apply to two other cases which, *a contrario*, arise out of the provisions of article 19 (a) and (b):

- Cases in which a reservation is implicitly authorized because it does not fall under the category of prohibited reservations (subparagraph (a));
- Cases in which a reservation is expressly authorized without being "specified".

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[137] In the case of treaties with limited participation and the constituent instruments of international organizations. These cases do not constitute instances of implicit prohibitions of formulating reservations; they reintroduce the system of unanimity for particular types of treaties.

[138] In its observations on the draft adopted in first reading by the Commission, Canada had suggested that "consideration should be given to extending the criterion of 'compatibility with the object and purpose' equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty is silent on the making of reservations and cases where it permits them." (Sir Humphrey Waldock, fourth report, A/CN.4/177, op. cit., note 20, p. 48). That proposal, which was not very clear, was not retained by the Commission; cf. the clearer proposals along the same lines by Briggs in *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 246, paras. 13 and 14, and ibid., 1965, vol. I, 813th meeting, 29 June 1965, p. 288, para. 10; *contra*: Ago, ibid., para. 16.

[139] Cf. article 20, para. 1.

[140] Cf. above, para. 39.

[141] Cf. above, para. 20.

60. In both these cases, it cannot be presumed that treaty-based authorization to formulate reservations is equivalent to a blank cheque given to States or international organizations to formulate any reservation they wish even if to do so would leave the treaty as an empty shell.

61. On the subject of implicitly authorized reservations, Sir Humphrey Waldock recognized, in his fourth report on the law of treaties, that "a conceivable exception [to the principle of automatic validity of reservations permitted by the treaty] might be where a treaty expressly forbids certain specified reservations and thereby implicitly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations". However, he excluded that eventuality not because this was untrue but because "this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 [which became article 19 of the Convention] as simple as possible".[142] These considerations do not apply to the Guide to Practice, the aim of which is precisely to provide States with coherent answers to all questions they may have in the area of reservations.

62. It should therefore certainly be specified in the Guide that reservations which are "implicitly authorized" because they are not formally excluded by the treaty must be compatible with the object and purpose of the treaty. It would certainly be paradoxical, to say the least, if reservations to treaties containing reservations clauses should be allowed more liberally than in the case of treaties which contain no such clauses.[143]

63. Draft guideline 3.1.3, which envisages that case, could read as follows:

> *3.1.3. Reservations implicitly permitted by the treaty*
>
> *Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.*

64. The problem arises in the same way if the prohibition of reservations is implicit (case of subparagraph (b)).

65. As stated above,[144] the Polish amendment to subparagraph (b), adopted by the Vienna Conference in 1968, restricted the possibility of implicit prohibition of reservations to treaties which provided "that *only specified* reservations, which do not include the reservation in question, may be formulated". It follows that if authorized reservations are not specified, they must be subject to the same general conditions as reservations to treaties which do not contain specific clauses.

66. Indeed, the modification made to subparagraph (c) itself following the Polish amendment goes in that direction. In the Commission's text, subparagraph (c) was drafted as follows:

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[142] Report cited above in note 20, A/CN.4/177, p. 53, para. 4.

[143] In that vein, Rosenne in *Yearbook ... 1965*, vol. I, p. 164, 797th meeting, 8 June 1965, para. 10.

[144] Para. 37.

"(c) *In cases where the treaty contains no provisions regarding reservations*, the reservation is incompatible with the object and purpose of the treaty."[145]

This was consistent with subparagraph (b), which prohibited the formulation of reservations other than those authorized by a reservations clause. Once an authorization was no longer interpreted *a contrario* as automatically excluding other reservations, the formula could not be retained;[146] it was therefore changed to the current wording by the Drafting Committee of the Vienna Conference.[147] The result is, *a contrario*, that if a reservation does not fall within the scope of subparagraph (b) (because it is not specified), it is subject to the test of compatibility with the object and purpose of the treaty.

67. That was, indeed, the argument adopted by the arbitral tribunal which settled the *Mer d'Iroise* dispute in deciding that the mere fact that article 12 of the Geneva Convention on the Continental Shelf authorizes certain reservations without specifying them[148] did not necessarily mean that such reservations were automatically valid.[149]

68. In such cases, the validity of the reservation "cannot be assumed simply on the ground that it is, or purports to be, a reservation to an article to which reservations are permitted".[150] Its validity should be assessed in light of its compatibility with the object and purpose of the treaty.[151]

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[145] *Yearbook ... 1966*, vol. II, p. 202.

[146] Poland had not, however, put forward any amendment to subparagraph (c), taking into account the amendment it had successfully proposed for subparagraph (b). An amendment by Viet Nam, however, intended to delete the phrase "in cases where the treaty contains no provisions regarding reservations" (A/CONF.39/C.1/L.12), *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), cited above in note 28, p. 145; para. 177 was rejected by the Commission in plenary (ibid., p. 148, para. 181).

[147] Curiously, the reason given by the Chairman of the Drafting Committee makes no connection between the modifications made to subparagraphs (b) and (c). K. Yasseen merely stated that "certain members of the Committee considered that a treaty could conceivably contain provisions on reservations which did not come under any of the categories envisaged in subparagraphs (a) and (b)" (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), cited above in note 31, plenary Commission, 70th meeting, 14 May 1968, p. 452, para. 17). Cf. a remark by Briggs to the same effect during discussions in the Commission in 1965 (*Yearbook ... 1965*, vol. I, 796th meeting, 4 June 1965, p. 161, para. 37).

[148] Cf. above, para. 39.

[149] Decision cited above in note 90, p. 161, para. 39. Cf. above, para. 40.

[150] D. Bowett, *op. cit.* note 109, p. 72. In the same vein, J. M. Ruda, op. cit., note 17, p. 182 or Gérard Teboul, "Remarques sur les réserves aux conventions de codification", *Revue générale de droit international public (R.G.D.I.P.)* 1982, pp. 691-692. *Contra* P.-H. Imbert, op. cit., note 113, pp. 50-53; this opinion, very well argued, does not sufficiently take into account the consequences of the modification made to subparagraph (c) at the Vienna Conference (cf. above para. 64).

[151] C. Tomuschat gives a pertinent example: "If, for example, a convention on the protection of human rights prohibits in a 'colonial clause' the exception of dependent territories from the territorial scope of the treaty, it would be absurd to suppose that consequently reservations of any kind, including those relating to the most elementary guarantees of individual freedom, are authorised, even if by these restrictions the treaty would be deprived of its very substance" (op. cit. note 55, p. 474).

69. This observation could be the subject of a draft guideline 3.1.4, worded as follows:

3.1.4. Non-specified reservations authorized by the treaty

Where the treaty authorizes certain reservations without specifying them, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.

70. Another possibility might be to specify, in a single draft guideline combining the aforementioned wordings for 3.1.3 and 3.1.4, the cases in which the formulation of a reservation is subject to compliance with the condition of compatibility with the object and purpose of the treaty, despite the existence in the text of the treaty of a reservations clause:

3.1.3./3.1.4 Compatibility of reservations authorized by the treaty with its object and purpose

Where the treaty expressly or implicitly authorizes certain reservations without specifying them, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.

71. This compact wording no doubt has the disadvantage of combining two distinct cases, one related to article 19 (a) of the Vienna Conventions, the other to article 19 (b), making it somewhat esoteric for an uninformed reader who does not have access to the commentaries. The Special Rapporteur, however, defers to the wisdom of the Commission in the choice of a single draft guideline or two separate guidelines.

2. Concept of the object and purpose of the treaty

72. Two authors conclude a minutely detailed study devoted to the concept of "the object and purpose of a treaty" by noting with regret "that the object and purpose of a treaty are indeed something of an enigma".[152] Certainly, the attempt made in article 19, subparagraph (c), to introduce an element of objectivity into a largely subjective system is not entirely convincing:[153] "The claim that a particular reservation is contrary to object and purpose is easier made than substantiated."[154] In their joint opinion, the dissenting judges in 1951 had criticized the solution retained by the majority in the case concerning *Reservations to the Genocide*

[152] Isabelle Buffard and Karl Zemanek, "The 'object and purpose' of a treaty: an enigma?", *Austrian Review of International and European Law* (*A.R.I.E.L.*) 1998, p. 342. The uncertainties surrounding this criterion have been noted (and criticized with varying degrees of harshness) in all the scholarly writing: see, for example, A. Aust, op. cit., note 27, p. 111; P. M. Dupuy, *Droit international public*, Dalloz, Paris, p. 273; Gerald G. Fitzmaurice, "Reservations to multilateral conventions", *International and Comparative Law Quarterly* (*I.C.L.Q.*) 1953, p. 12; M. Rama-Montaldo, op. cit., note 134, p. 1265; Charles Rousseau, *Droit international public*, vol. I, *Introduction et sources*, Sirey, Paris, 1970, p. 126; G. Teboul, op. cit., note 150, pp. 695-696; or A. Pellet, preliminary report, A/CN.4/470, p. 51, para. 109.

[153] According to Jean Kyongun Koh, "[t]he International Court thereby introduced purposive words into the vocabulary of reservations which had previously been dominated by the term 'consent'" ("Reservations to multilateral treaties: how international legal doctrine reflects world vision", *Harvard International Law Journal* (*Harvard I.L.J.*) 1982, p. 85).

[154] L. Lijnzaad, op. cit., note 84, pp. 82-83.

Convention, emphasizing that it could not "produce final and consistent results",[155] and this had been one of the main reasons for the Commission's resistance to the flexible system adopted by the Court in 1951:

> "Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively."[156]

73. Sir Humphrey Waldock himself still had hesitations in his all important first report on the law of treaties in 1962:[157]

> "... the principle applied by the Court is essentially subjective and unsuitable for use as a general test for determining whether a reserving State is or is not entitled to be considered a party to a multilateral treaty. The test is one which might be workable if the question of 'compatibility with the object and purpose of the treaty' could always be brought to independent adjudication; but that is not the case ...
>
> "Nevertheless, the Court's criterion of 'compatibility with the object and purpose of the convention' does express a valuable concept to be taken into account both by States formulating a reservation and by States deciding whether or not to consent to a reservation that has been formulated by another State. (...) The Special Rapporteur, although also of the opinion that there is value in the Court's principle as a general concept, feels that there is a certain difficulty in using it as a *criterion* of a reserving State's status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States."[158]

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[155] *I.C.J. Reports 1951*, p. 44.

[156] *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), p. 128, para. 24.

[157] It was this report that introduced the "flexible system" to the Commission and vigorously defended it (A/CN.4/144, cited above in note 23, pp. 63-65).

[158] *Yearbook ... 1962*, vol. II, pp. 65-66, para. 10; on the same lines, see Waldock's oral statement, ibid., vol. I, 651st meeting, 25 May 1962, p. 139, paras. 4-6; however, during the discussion the Special Rapporteur did not hesitate to characterize the principle of compatibility as a "test" (see p. 145, para. 85 — this paragraph also shows that, from the outset, in Waldock's mind, this test was decisive as far as the formulation of reservations was concerned (in contrast to objections, for which the consensual principle alone appeared practicable to him)). The wording used in draft article 17, paragraph 2 (a), which was proposed by the Special Rapporteur, reflects this uncertainty: "When formulating a reservation under the provisions of paragraph 1 (a) of this article [with respect to this provision, see above, para. 23], a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty" (ibid., vol. II, p. 60). This principle met with general approval during the Commission's debates in 1962 (see in particular Briggs (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 23); Lachs (p. 142, para. 54); Rosenne (pp. 144-145, para. 79), who has no hesitation in speaking of a "test" (see also p. 145, para. 82, and 653rd meeting, 29 May 1962, p. 156, para. 27); Castrén (652nd meeting, p. 148, para. 25)) and in 1965 (Yasseen (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, pp. 149-150, para. 20); Tunkin (p. 150, para. 25); see, however, the objections by De Luna (652nd meeting, 28 May 1962, p. 148, para. 18, and 653rd meeting, p. 160, para. 67); Gros (652nd meeting, p. 150, paras. 47-51); or Ago (653rd meeting, p. 157, para. 34); or, during the debate in 1965, those of Ruda (ibid., 796th meeting, 4 June 1965, p. 147, para. 55, and 797th meeting, 8 June 1965, p. 154, para. 69); and Ago (798th meeting, 9 June 1965, p. 161, para. 71)). To the end, Tsuruoka, the Japanese member of the Commission, opposed subparagraph (c) and, for that reason, he abstained in the voting on draft article 18 as a

No doubt, this was a case of tactical caution for the "conversion" of the self-same Special Rapporteur to compatibility with the object and purpose of the treaty, not only as a test of the validity of reservations, but also as a key element to be taken into account in interpretation,[159] was swift.[160]

74. This criterion has considerable merit. Notwithstanding the inevitable "margin of subjectivity" — which is limited, however, by the general principle of good faith — article 19, subparagraph (c), is undoubtedly a useful guideline capable of resolving most problems that arise in a reasonable manner.

(a) Meaning of the expression "object and purpose of the treaty"

75. The preparatory work on this provision is of little assistance in determining the meaning of the expression.[161] As has been noted,[162] the commentary to draft article 16, adopted by the — usually more prolix — Commission in 1966, is confined to a single paragraph and does not even allude to the difficulties involved in defining the object and purpose of the treaty, other than very indirectly through a careful (or careless?[163]) reference to draft article 17:[164] "The admissibility or otherwise of a reservation under paragraph (*c*) (...) is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States".[165]

76. The discussion of subparagraph (c) in the Commission[166] and subsequently at the Vienna Conference[167] does not shed any more light on the meaning of the expression "object and purpose of the treaty" for the purposes of this provision, nor do the other provisions of the Convention that use it.

77. There are seven such provisions,[168] including one — article 20, paragraph 2 — concerning reservations. However, none of them defines the concept of the object

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whole (adopted by 16 votes to none with one abstention on 2 July 1965 — ibid., 816th meeting, p. 283, para. 42).

159 See article 31, para. 1, of the Convention.

160 See I. Buffard and K. Zemanek, op. cit., note 152, pp. 320-321.

161 See ibid., pp. 319-321.

162 C. Redgwell, "The law of reservations in respect of multilateral conventions", in J. P. Gardner, ed., *Human Rights as General Norms and a State's Right to Opt Out — Reservations and Objections to Human Rights Conventions*, British Institute of International Comparative Law B.I.I.C.L., London, 1997, p. 7.

163 Article 20 in no way resolves the issue, which is left pending.

164 Future article 20 of the Convention.

165 *Yearbook ... 1965*, vol. II, p. 207, para. 17. The commentary to the corresponding provision adopted in 1962 (art. 18, para. 1 (d)), is no more forthcoming (see *Yearbook ... 1962*, vol. II, p. 180, para. 15).

166 See above, note 158.

167 It is significant that none of the amendments proposed to the Commission's draft article 16 — including the most radical ones — called this principle into question. At most, the amendments by Spain, the United States of America and Colombia proposed adding the concept of the "nature" of the treaty or substituting it for that of the object (see above, note 60).

168 Cf. articles 18, 20, paragraph 2, 31, paragraph 1, 33, paragraph 4, 41, paragraph 1 (b) (ii), 58, paragraph 1 (b) (ii) and 60, paragraph 3 (b). A connection can be made with the provisions relating to the "essential bas[e]s" or "condition[s] of the consent to be bound" (cf. Paul Reuter, op. cit., note 45, p. 627 (or p. 366)).

and purpose of the treaty or provides any particular "clues" for this purpose.[169] At most, one can infer that a fairly general approach is required: it is not a question of "dissecting" the treaty in minute detail and examining its provisions one by one, but of extracting the "essence", the overall "mission" of the treaty:

- It is unanimously accepted that article 18, subparagraph (a), of the Convention does not oblige a signatory State to *respect* the treaty, but merely to refrain from rendering the treaty inoperative prior to its expression of consent to be bound;[170]

- Article 58, paragraph 1 (b) (ii), is drafted in the same spirit: one can assume that it is not a case of compelling respect for the treaty, the very object of this provision being to determine the conditions in which the operation of the treaty may be suspended, but rather of preserving what is essential in the eyes of the contracting parties;

- Article 41, paragraph 1 (b) (ii), is also aimed at safeguarding the "effective execution (...) of the treaty *as a whole*"[171] in the event that it is modified between certain of the contracting parties only;

- Likewise, article 60, paragraph 3 (b), defines a "material breach" of the treaty, in contrast to other breaches, as "the violation of a[n *essential*] provision"; and

- According to articles 31, paragraph 1, and 33, paragraph 4, the object and purpose of the treaty are supposed to "clarify" its overall meaning thereby facilitating its interpretation.[172]

78. There is little doubt that the expression "object and purpose of the treaty" has the same meaning in all of these provisions: one indication of this is that Waldock, who without exaggeration can be considered to have invented or, at any rate, overseen the advent of the law of reservations to treaties in the Vienna Convention, referred to them[173] explicitly in order to justify the inclusion of this criterion in subparagraph (c) through a kind of *a fortiori* reasoning: since "the objects and purposes of the treaty (...) are criteria of fundamental importance for the interpretation (...) of a treaty" and since "the Commission has proposed that a State which has signed, ratified, acceded to, accepted or approved a treaty should, even before it comes into force, refrain from acts calculated to frustrate its objects", it would seem "somewhat strange if a freedom to make reservations incompatible with the objects and purposes of the treaty were to be recognized".[174] However, this does

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[169] As I. Buffard and K. Zemanek noted (op. cit., note 152, p. 322), the Commission's commentaries to the draft article in 1966 are virtually silent on the matter.

[170] See, for example, P. Reuter, op. cit., note 28, p. 62, who defines the obligation arising from article 18 as an obligation of conduct or P. Cahier, "L'obligation de ne pas priver un traité de son object et de son but avant son entrée en vigueur", *Mélanges Fernand Dehousse*, Nathan Paris, vol. I, p. 31.

[171] In this provision, the words "of the object and purpose", which are replaced by an ellipsis in the above quotation, obscure rather than clarify the meaning.

[172] See *Pajzs, Csáky and Esterházy, Judgment of 16 December 1936, P.C.I.J., Series A/B, No. 68*, p. 60; see also Suzanne Bastid, *Les traités en droit international public — conclusion et effets*, Economica, Paris, 1985, p. 131, or Serge Sur, *L'interprétation en droit international public*, L.G.D.J., Paris, 1974, pp. 227-230.

[173] More precisely, to (the current) articles 18 and 31.

[174] Fourth report, A/CN.4/177, cited above in note 20, p. 51, para. 6.

not solve the problem: we have a criterion, a unique and versatile criterion, but no definition of this criterion.

79. Nor does international jurisprudence enable us to define it, even though it is in common use.[175] There are, however, some helpful hints, particularly in the advisory opinion of the International Court of Justice of 1951 on *Reservations to the Genocide Convention*.

80. The expression seems to have been used for the first time in its current form[176] in the advisory opinion of the Permanent Court of International Justice of 31 July 1930 on the *Greco-Bulgarian "Communities"*.[177] However, it was not until 1986 in the *Nicaragua* case,[178] that the Court put an end to what has been described as "terminological chaos",[179] no doubt influenced by the Vienna Convention.[180]

81. It is difficult, however, to infer a great deal from this relatively abundant case law regarding the method to be followed for determining the object and purpose of a given treaty: the Court often proceeds by simple affirmations[181] and, when it seeks

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[175] Once again, see I. Buffard and K. Zemanek, op. cit., note 152, pp. 312-319, and below, note 180.

[176] I. Buffard and K. Zemanek note (ibid., p. 315) that the expression "the aim and the scope" had already been used in the advisory opinion of the Permanent Court of International Justice of 23 July 1926 on the *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* in reference to Part XIII of the Treaty of Versailles (*Series B, No. 13*, p. 18). The same authors, after citing exhaustively the relevant decisions of the Court, describe the difficulty of establishing definitive terminology (especially in English) in the Court's case law (ibid., pp. 315-316).

[177] The terms are inverted, however: the Court bases itself on "the aim and object" of the Greco-Bulgarian Convention of 27 November 1919, *Series B, No. 17*, p. 21.

[178] *Military and Paramilitary Activities In and Against Nicaragua, Judgment of 27 June 1986*, I.C.J. Reports 1986, pp. 136-137, paras. 271-273, p. 138, para. 275, or p. 140, para. 280.

[179] I. Buffard and K. Zemanek, op. cit., note 152, p. 316.

[180] Henceforth, the terminology used by the Court seems to have been firmly established, see *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment of 20 December 1988, I.C.J. Reports 1988*, p. 89, para. 46; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment of 14 June 1993, I.C.J. Reports 1993*, pp. 49-51, paras. 25-27; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994, I.C.J. Reports 1994*, pp. 25-26, para. 52; *Oil Platforms, Preliminary Objection, Judgment of 12 December 1996, I.C.J. Reports 1996*, p. 813, para. 27; *Gabčikova-Nagymaros Project, Judgment of 25 September 1997, I.C.J. Reports 1997*, p. 64, para. 104, and p. 67, para. 110; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment of 11 June 1998, I.C.J. Reports 1998*, p. 318, para. 98; *Kasikili/Sedudu Island, Judgment of 13 December 1999, I.C.J. Reports 1999*, pp. 1072-1073, para. 43; *LaGrand, Judgment of 27 June 2001, I.C.J. Reports 2001*, pp. 502-503, para. 102; *Sovereignty over Pulau Ligitan and Pulau Sipadan, Merits, Judgment of 17 December 2002, I.C.J. Reports 2002*, p. 652, para. 51; *Avena and Other Mexican Nationals, Judgment of 31 March 2004, I.C.J. Reports 2004*, p. 48, para. 85; *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment of 15 December 2004*, para. 102; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 179, para. 109.

[181] See, for example, *Jurisdiction of the European Commission of the Danube between Galatz and Braila, Advisory Opinion of 8 December 1927, P.C.I.J., Series B, No. 14*, p. 64: "It is obvious that the object of the Treaty of Paris [of 1856] (...) has been to assure freedom of navigation ..."; *International Status of South-West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950*, pp. 136-137, and the judgment of 14 June 1993 cited above, p. 50, para. 27, the judgment of 25 September 1997 cited above, p. 67, para. 110, the judgment of 11 June 1998 cited above, p. 318, para. 98, the judgment of 27 June 2001 cited above, p. 502, para. 102, and the judgment of 15 December 2004 cited above, para. 102.

to justify its position, it does so empirically. At most, it may be observed that the Court has deduced the object and purpose of a treaty:

- From its title;[182]
- From its preamble;[183]
- From an article placed at the beginning of the treaty that "must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied";[184]
- From an article of the treaty that demonstrates "the major concern of each contracting party" when it concluded the treaty;[185]
- From the preparatory work on the treaty;[186] and
- From its overall framework.[187]

It is difficult, however, to regard this as a "method" properly speaking: these disparate elements are taken into consideration, sometimes separately, sometimes together, and the Court forms a "general impression", in which intuition and subjectivity inevitably play a large part.[188]

82. It has been asked whether, in order to get around the difficulties resulting from such uncertainty, there is a need to delink the concept of the "object and purpose of the treaty" by looking first for the object and then for the purpose. For example, during the discussion of draft article 55 concerning the rule of *pacta sunt servanda*, Reuter emphasized that "the object of an obligation was one thing and its purpose

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[182] Cf. *Certain Norwegian Loans, Judgment of 6 July 1957, I.C.J. Reports 1957*, p. 24; but see the judgment of 27 June 1986 cited above in note 178, p. 137, para. 273, and the judgment of 12 December 1996 cited above in note 180, p. 814, para. 28.

[183] Cf. the advisory opinion of the Permanent Court of International Justice of 31 July 1930 cited above in note 177, p. 19, or *Rights of Nationals of the United States of America in Morocco, Judgment of 27 August 1952, I.C.J. Reports 1952*, p. 196, or the judgment of 27 June 1986 cited above in note 504, p. 138, para. 275, the judgment of 3 February 1994 cited above in note 180, pp. 25-26, para. 52, the judgment of 17 December 2002 cited above, ibid., p. 652, para. 51; see also the dissenting opinion of Judge Anzilotti appended to *Interpretation of the 1919 Convention Concerning Employment of Women During the Night, Advisory Opinion of 15 November 1932, P.C.I.J., Series A/B, No. 50*, p. 384.

[184] Judgment of 12 December 1996 cited above in note 180, p. 814, para. 28.

[185] Judgment of 13 December 1999 cited above in note 180, pp. 1072-1073, para. 43.

[186] Often, as a way of confirming an interpretation based on the text itself; cf. the judgment of 3 February 1994 cited above in note 180, pp. 27-28, paras. 55-56, the judgment of 13 December 1999 cited above, ibid., p. 1074, para. 46, or the advisory opinion of 9 July 2004 cited above, ibid., p. 179, para. 109; see also the dissenting opinion of Judge Anzilotti cited above in note 183, pp. 388-389. In its advisory opinion of 28 May 1951 on *Reservations to the Genocide Convention*, the Court gives some weight to the "origins" of the Convention (*I.C.J. Reports 1951*, p. 23).

[187] Cf. *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer, Advisory Opinion of 23 July 1926, P.C.I.J., Series B, No. 13*, p. 18, the advisory opinion of the Permanent Court of International Justice of 31 July 1930 cited above in note 177, p. 20, or the judgment of the International Court of Justice of 12 December 1996 cited above in note 180, p. 813, para. 27; the judgment of 17 December 2002 cited above, ibid., p. 652, para. 51.

[188] "One could just as well believe it was simply by intuition" (I. Buffard and K. Zemanek, op. cit., note 152, p. 319).

was another".[189] As has been noted, the distinction is common in French (or francophone) doctrine,[190] while it provokes scepticism among authors trained in the German or English systems.[191]

83. However, one (French) author has shown convincingly that "the question cannot be settled" by reference to international jurisprudence,[192] particularly since neither the object — defined as the actual content of the treaty[193] — still less the purpose — the outcome sought[194] — remain immutable over time, as the theory of emergent purpose advanced by Sir Gerald Fitzmaurice clearly demonstrates: "The notion of object or [and?] purpose is itself not a fixed and static one, but is liable to change, or rather develop as experience is gained in the operation and working of the convention."[195]

84. Thus, it is hardly surprising that the attempts made in scholarly writing to define a general method for determining the object and purpose of the treaty have proved to be disappointing. The most convincing method, devised by Ms. Buffard and Mr. Zemanek, would involve a two-stage process: in the first stage, one would have "recourse to the title, preamble and, if available, programmatic articles of the treaty"; in the second stage, the conclusion thus reached *prima facie* would have to be tested in the light of the text of the treaty.[196] However, the application of this apparently logical method[197] to concrete situations turns out to be rather unconvincing: the authors admit that they are unable to determine objectively and simply the object and purpose of four out of five treaties or groups of treaties used to illustrate their method[198] and conclude that the concept indeed remains an "enigma".[199]

85. Other scholarly attempts are scarcely more convincing, despite the fact that their authors are less modest and are often categorical in defining the object and

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[189] *Yearbook ... 1964*, vol. I, 19 May 1964, 726th meeting, p. 26, para. 77. Elsewhere, however, the same author manifests a certain scepticism regarding the utility of the distinction (see op. cit., note 45, p. 628, or *Le développement de l'ordre juridique international*, cited ibid., p. 367).

[190] See I. Buffard and K. Zemanek, op. cit., note 152, pp. 325-327.

[191] Ibid., pp. 322-325 and 327-328.

[192] G. Teboul, op. cit., note 150, p. 696.

[193] See, for example, Jean-Paul Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public*, Paris, L.G.D.J., 1972, p. 142: The object of an instrument resides in the rights and obligations to which it gives rise.

[194] Ibid.

[195] "The law and procedure of the International Court of Justice: treaty interpretation and other treaty points", *British Yearbook of International Law (B.Y.B.I.L.)* 1957, p. 208. See also G. Teboul, op. cit., note 150, p. 697, or William A. Schabas, "Reservations to the Convention on the Rights of the Child", *European Journal of International Law (E.J.I.L.)* 1996, p. 479.

[196] Op. cit., note 152, p. 333.

[197] Although it does reverse the order stipulated in article 31 of the Vienna Convention, under which the "terms of the treaty" are the starting point for any interpretation. See also the advisory opinion of the Inter-American Court of Human Rights of 8 September 1983 on *Restrictions to the death penalty*, OC-3/83, *Series A*, No. 3, French text in *Revue universelle des droits de l'homme (R.U.D.H.)* 1992, para. 50, p. 304.

[198] The five treaties considered are the Charter of the United Nations, the Vienna Convention on Diplomatic Relations, the Vienna Convention on the Law of Treaties, the general human rights conventions and the Convention on the Elimination of All Forms of Discrimination against Women and the other human rights conventions dealing with specific rights; the method proposed proves convincing only in the latter instance (ibid., pp. 334-342).

[199] See above para. 72.

purpose of the treaty studied. Admittedly, they are often dealing with human rights conventions, which lend themselves easily to conclusions influenced by ideologically oriented positions, one symptom of which is the insistence that all the substantive provisions of such treaties reflect their object and purpose (which, taken to its logical extremes, is tantamount to precluding any reservation from being valid).[200]

86. Given the great variety of situations and their susceptibility to change over time,[201] it would appear to be impossible to devise a single set of methods for determining the object and purpose of a treaty, and admittedly a certain amount of subjectivity is inevitable — however, that is not uncommon in law in general and international law in particular. The basic problem is one of interpretation: mutatis mutandis, the "general rule of interpretation" set forth in article 31 of the Vienna Convention and the "supplementary means of interpretation" set forth in article 32 are applicable when seeking to determine the object and purpose of a treaty.[202]

87. That conclusion, of course, is to some extent tautological,[203] since paragraph 1 of article 31 reads:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*." [emphasis added]

However, the above provision actually relates to the interpretation of a specific clause of the treaty,[204] and just as "[t]he objects and purposes of the treaty are criteria of fundamental importance for the interpretation ... of a treaty",[205] so, when it is a question of determining the object and purpose of a treaty as a whole, the treaty must be interpreted in good faith, in its entirety, in accordance with the

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[200] For a critique of this extreme view, see W. A. Schabas, op. cit., note 195, pp. 476-477, or "Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party?", *Brooklyn Journal of International Law (Brooklyn Jl. of I.L.)* 1995, pp. 291-293. On the position of the Human Rights Committee, see below, para. 100.

[201] See para. 83 above. The question could also be raised whether the cumulative weight of separate reservations, each of which, taken alone, would be admissible, might not ultimately result in their incompatibility with the object and purpose of the treaty (see Belinda Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women", *American Journal of International Law* (*A.J.I.L.*) 1991, p. 314; and Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", *Virginia Journal of International Law*, vol. 30, 1990, pp. 706-707).

[202] See Advisory Opinion of 8 September 1983 of the Inter-American Court of Human Rights concerning restrictions to the death penalty, cited in note 197 above, para. 63, p. 306; see also L. Sucharipa-Behrmann, "The Legal Effects of Reservations to Multilateral Treaties", *Austrian Review of International and European Law* (*A.R.I.E.L.*), 1996, p. 76. While showing that it was aware that the rules on interpretation of treaties could be directly transposed to unilateral statements formulated by the parties concerning a treaty (reservations and interpretative declarations), the International Law Commission recognized that those rules constituted useful guidelines in that regard (cf. draft guideline 1.3.1, "Method of implementation of the distinction between reservations and interpretative declarations", and the commentary on it, *Yearbook ... 1999*, vol. II (Part One), pp. 107-109). This is true *a fortiori* when the aim is to assess the compatibility of a reservation with the object and purpose *of the treaty* itself.

[203] See W. A. Schabas, op. cit., in note 63 above, p. 48.

[204] As paragraph 2 of the article makes clear, by defining context as the text "including its preamble and annexes".

[205] Sir Humphrey Waldock in his fourth report on the law of treaties (A/CN.4/177), cited above in note 20, *Yearbook ... 1965*, vol. II, p. 51, para. 6; see para. 78 above.

ordinary meaning to be given to the terms of the treaty in their context, including the preamble, taking into account practice[205] and, when appropriate, the preparatory work of the treaty and the "circumstances of its conclusion".[207]

88. As Ago argued during the debate in the Commission on draft article 17 (article 19 of the Vienna Convention):

> "The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible."[208]

These are the two fundamental elements: the object and purpose can only be determined by an examination of the treaty as a whole;[209] and, on that basis, reservations to the "essential"[210] clauses, and only to such clauses, are rejected.

89. In other words, it is the "effectiveness",[211] the "raison d'être"[212] of the treaty, its "fundamental core" [213] that is to be preserved. "It implies a distinction between all obligations in the treaty and the core obligations that are the treaty's *raison d'être*. [214] This should be reflected in a draft guideline 3.1.5, worded as follows:

> *3.1.5 Definition of the object and purpose of the treaty*
>
> *For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its raison d'être.*

90. As to the method to be followed in each specific case to determine the object and purpose of the treaty, it is by no means easy to put together in a single formula all the elements to be taken into account. Such a process undoubtedly requires more

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[206] See article 31, paragraph 3.

[207] Article 32.

[208] *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 141, para. 35.

[209] What is involved is to examine whether the reservation is compatible "with the general tenor" of the treaty (Bartoš, ibid., p. 142, para. 40).

[210] And not those that related "to detail only" (Paredes, ibid., p. 146, para. 90).

[211] See European Court of Human Rights, *Loizidou*, Judgment of 23 March 1995 (Preliminary Objections), *Publications of the European Court of Human Rights*, series A, vol. 310, p. 27, para. 75: acceptance of separate regimes of enforcement of the European Convention on Human Rights "would ... diminish the effectiveness of the convention as a constitutional instrument of European public order (*ordre public*)".

[212] International Court of Justice, Advisory Opinion of 28 May 1951, *I.C.J. Reports 1951*, p. 21: "none of the contracting parties is entitled to frustrate or impair ... the purpose and *raison d'être* of the convention".

[213] Statement by the representative of France to the Third Committee at the eleventh session of the General Assembly, 703rd meeting on 6 December 1956, quoted in A. C. Kiss, *Répertoire de la pratique française en matière de droit international public*, Centre national de la recherche scientifique, Paris, 1962, vol. I, p. 277, no. 552.

[214] L. Lijnzaad, op. cit. in note 84 above, p. 83; see also p. 59 or L. Sucharipa-Behrmann, op. cit. in note 202 above, p. 76.

"*esprit de finesse*" than "*esprit de géométrie*",[215] like any act of interpretation, for that matter, in which category the process falls.[216]

91. However, while the very general guidelines indicated above will, to be sure, not resolve all problems, they can certainly contribute to a solution if they are applied in good faith and with a little common sense, and it would appear to be legitimate to transpose the principles in articles 31 and 32 of the Vienna Conventions applicable to the interpretation of treaties and adapt them to the determination of the object and purpose of a treaty. For that purpose, a draft guideline 3.1.6 might be worded as follows:

> *3.1.6 Determination of the object and purpose of the treaty*
>
> *1. In order to determine the object and purpose of the treaty, the treaty as a whole must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.*
>
> *2. For that purpose, the context includes the preamble and annexes. Recourse may also be had in particular, to the preparatory work of the treaty and the circumstances of its conclusion, and to the title of the treaty and, where appropriate, the articles that determine its basic structure [and the subsequent practice of the parties].*

92. The phrase in square brackets echoes the discussion referred to in paragraph 83 above concerning the possibility that the object and purpose of the treaty will evolve over time. But it remains to be decided whether it is preferable to include the phrase in the wording of the draft guideline itself or merely to raise the point in the commentary.

(b) Application of the criterion

93. In some cases, the application of these methodological guidelines raises no problems. It is obvious that a reservation to the Convention on the Prevention and Punishment of the Crime of Genocide by which a State sought to reserve the right to commit some of the prohibited acts in its territory or in certain parts thereof would be incompatible with the object and purpose of the Convention.[217] Thus, for example, Germany and a number of other European countries presented the following arguments in support of their objections to a reservation formulated by Viet Nam to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988:

> "... The reservation made in respect of article 6 is contrary to the principle 'aut dedere aut iudicare' which provides that offences are brought before the court or that extradition is granted to the requesting States.

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[215] Blaise Pascal, *Pensées*, Oeuvres complètes, Bibliothèque de la Pléiade, N.R.F.-Gallimard, 1954, p. 1091.

[216] See paras. 89 and 90 above.

[217] The question is particularly relevant with regard to the scope of the infamous "colonial clause" in article XII of the Convention, a clause contested with some justification by the Soviet bloc countries, which had made reservations to it (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003* (United Nations publication, Sales No. E.04.V.2) (hereinafter *Multilateral Treaties* ...), vol. I, pp. 123-132); although the focus here is on the validity of that quasi-reservation clause, it does raise the question of the validity of objections to such reservations.

"The Government of the Federal Republic of Germany is therefore of the opinion that the reservation jeopardizes the intention of the Convention, as stated in article 2, paragraph 1, to promote cooperation among the parties so that they may address more effectively the international dimension of illicit drug trafficking.

"The reservation may also raise doubts as to the commitment of the Government of the Socialist Republic of Viet Nam to comply with fundamental provisions of the Convention. ..."[218]

94. It can also happen that the prohibited reservation relates to less central provisions but is nonetheless contrary to the object and purpose of the treaty because it makes its implementation impossible. That is the rationale behind the wariness the Vienna Convention displays towards reservations to constituent instruments of international organizations.[219] For example, the German Democratic Republic, when ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, declared that it would only bear its share of the expenses of the Committee against Torture for activities for which it recognized that the Committee had competence.[220] Luxembourg objected to that "declaration" (which was actually a reservation), arguing, correctly, that the effect would be "to inhibit activities of the Committee in a manner incompatible with the purpose and the goal of the Convention".[221]

95. It is clearly impossible to draw up an exhaustive list of the potential problems that may arise concerning the compatibility of a reservation with the object and

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[218] *Multilateral Treaties* ..., cited above in note 217, vol. I, p. 433; in the same vein see also the objections of Belgium, Denmark, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom and the less explicitly justified objections of Austria and France, ibid., pp. 433-435. See also the objection of Norway and the less explicit objections of Germany and Sweden to the Tunisian declaration concerning the application of the Convention relating to the Reduction of Statelessness of 1961, ibid., pp. 365-366. Another significant example is provided by the declaration of Pakistan concerning the International Convention for the Suppression of Terrorist Bombings of 1997, which excluded from the application of the Convention "struggles, including armed struggle, for the realization of the right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law", ibid., vol. II, p. 126. A number of States considered that "declaration" to be contrary to the object and purpose of the Convention, which is "the suppression of terrorist bombings, irrespective of where they take place and of who carries them out"; see the objections of Australia, Austria, Canada, Denmark, Finland, France, Germany, India, Italy, Japan (with a particular clear statement of reasons), the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America, ibid., pp. 128-133. Similarly, Finland justified its objection to the reservation made by Yemen to article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966 by the argument that "provisions prohibiting racial discrimination in the granting of such fundamental political rights and civil liberties as the right to participate in public life, to marry and choose a spouse, to inherit and to enjoy freedom of thought, conscience and religion are central in a convention against racial discrimination" (ibid., vol. I, p. 143).

[219] Cf. article 20, paragraph 3: "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization".

[220] See *Multilateral Treaties* ..., cited above in note 217, vol. I, p. 284, note 7; see also Richard W. Edwards, Jr., "Reservations to Treaties", *Michigan Journal of International Law*, Spring 1989, pp. 391-393 and 400.

[221] Ibid., p. 285. Fifteen other States raised objections on the same grounds.

purpose of the treaty. However, it is also clear that reservations to certain categories of treaties or treaty provisions or reservations having certain specific characteristics raise particular problems that should be examined, one by one, in an attempt to develop guidelines that would be helpful to States in formulating reservations of that kind or in responding to them knowledgeably. In that regard, it will be useful to examine:

- Reservations to dispute settlement clauses and clauses concerning the monitoring of the implementation of the treaty;
- Reservations to general human rights treaties;
- Reservations concerning the application of domestic law;
- Reservations that are vague and general;
- Reservations to provisions that express customary norms; and
- Reservations to provisions that express *jus cogens* rules or non-derogable rights.

(i) Reservations to clauses concerning dispute settlement and the monitoring of the implementation of the treaty

96. In his first report on the law of treaties, Fitzmaurice categorically stated: "It is considered inadmissible that there should be parties to a treaty who are not bound by an obligation for the settlement of disputes arising under it, if this is binding on other parties".[222] This position, obviously inspired by the cold war debate on reservations to the Genocide Convention, is too sweeping; moreover, it was rejected by the International Court of Justice, which, in its orders of 2 June 1999 in response to Yugoslavia's requests for the indication of provisional measures against Spain and against the United States in the cases concerning *Legality of Use of Force*, clearly recognized the validity of the reservations made by those two States to article IX of the Genocide Convention of 1948, which gives the Court jurisdiction to hear all disputes relating to the Convention,[223] even though some of the parties thought that such reservations were not compatible with the object and purpose of the Convention.[224] In its order on a request for the indication of provisional measures in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)*, the Court came to the same conclusion with regard to the reservation of Rwanda to the same provision, stating that "that reservation does not bear on the substance of the law, but only on the Court's jurisdiction" and that "it therefore does not appear contrary to the object and purpose of the Convention".[225] This conclusion is corroborated by the very common nature of such reservations and the erratic practice followed in the objections to them.[226] On the other hand, it is

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[222] A/CN.4/101, cited above in note 75, p. 127, para. 96; that was the purpose of draft article 37, paragraph 4, which the Special Rapporteur was proposing (ibid., p. 115).

[223] *I.C.J. Reports 1999*, p. 772, paras. 29-33, and pp. 923-924, paras. 21-25.

[224] See *Multilateral Treaties* ..., cited above in note 217, vol. I, pp. 127-128 (see in particular the clear objections to that effect of Brazil, China (Taiwan), Mexico and the Netherlands).

[225] *I.C.J. Reports 2002*, p. 246, para. 72.

[226] On this point see R. Riquelme Cortado, op. cit. in note 27 above, pp. 192-202. As it happens, objections to reservations to dispute settlement clauses are rare. Apart from the objections raised to reservations to article IX of the Genocide Convention, however, see the objections formulated by several States to the reservations to article 66 of the Vienna Convention on the Law of

self-evident that, if the commitment to obligatory dispute settlement is precisely the purpose of the treaty, a reservation excluding such settlement would, of course, be contrary to the object and purpose of the treaty.

97. According to the Human Rights Committee, the same holds for reservations to the International Covenant on Civil and Political Rights of 1966 relating to guarantees of its implementation:

> "These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. ... The Covenant ... envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is ... directed to securing the enjoyment of the rights, are ... incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty."[227]

With respect to the Optional Protocol, the Committee adds:

> "A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with the obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing

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Treaties, in particular the objections of Germany, Canada, Egypt, the United States of America (which argued that the reservation of Syria "is incompatible with the object and purpose of the Convention and undermines the principle of impartial settlement of disputes concerning the invalidity, termination and suspension of the operation of treaties, which was the subject of extensive negotiation at the Vienna Conference" (p. 334); see also para. 126 below), Japan, New Zealand, the Netherlands ("provisions regarding the settlement of disputes, as laid down in article 66 of the Convention, are an important part of the Convention and ... cannot be separated from the substantive rules with which they are connected" (p. 331)), the United Kingdom ("These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference." (p. 334)) and Sweden (espousing essentially the same position as the United Kingdom (pp. 332-333)) (*Multilateral Treaties* ..., cited above in note 217, vol. II, pp. 327-335).

[227] Human Rights Committee, General Comment No. 24 (CCPR/C/21/Rev.1/Add.6), 11 November 1994, para. 11; see also Françoise Hampson, Reservations to human rights treaties: final working paper, E/CN.4/Sub.2/2004/42, para. 55.

its views relating to a particular article of the Covenant in an individual case."[228]

Based on this reasoning, the Committee, in the *Rawle Kennedy* case, held that a reservation made by Trinidad and Tobago excluding the Committee's competence to consider communications relating to a prisoner under sentence of death was not valid.[229]

98. The European Court of Human Rights took a position that was just as extreme. In the *Loizidou* case, the Court concluded from an analysis of the object and purpose of the European Convention on Human Rights "that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their 'jurisdiction' from supervision by the Convention institutions"[230] and that any restriction of its competence *ratione loci* or *ratione materiae* was incompatible with the nature of the Convention.[231]

99. Some general lessons can be drawn from the foregoing analysis and embodied in a draft guideline 3.1.13:

3.1.13 Reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) The provision to which the reservation relates constitutes the raison d'être *of the treaty; or*

(ii) The reservation has the effect of excluding its author from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that the author has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

(ii) Reservations to general human rights treaties

100. It is also in the area of human rights that the liveliest debates have taken place, particularly over reservations made to general treaties such as the European, Inter-American and African Conventions or the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. In the case of the latter,

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[228] Ibid., para. 13. In the following paragraph, the Committee "considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose".

[229] Communication No. 845/1999, *Kennedy v. Trinidad and Tobago*, CCPR/C/67/D/845/1999, Report of the Human Rights Committee (A/55/40), vol. 3, annex XI.A, para. 6.7. To justify its reservation Trinidad and Tobago argued that it accepted "the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, but [it] stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant ..." (*Multilateral Treaties* ..., cited above in note 217, vol. I, p. 220). Seven States reacted with objections to the reservation, before Trinidad and Tobago finally denounced the Protocol as a whole.

[230] Judgement cited above in note 211, p. 28, para. 77.

[231] Ibid., paras. 70-89; see in particular para. 79. See also the decision of 4 July 2001 of the Grand Chamber on the admissibility of Application No. 48787/99 in the case of *Ilie Ilaşcu et al. v. Moldova and the Russian Federation*, p. 20.

the Human Rights Committee stated in its famous (and debatable) general comment No. 24 that:

> "In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken."[232]

Taken literally, this position would render invalid any general reservation bearing on any one of the rights protected by the Covenant.[233] That is not, however, the position of States parties which have not systematically formulated objections to reservations of this type,[234] and the Committee itself does not go that far because, in the paragraphs following the statement of its position of principle, it sets out in greater detail the criteria it uses to assess whether reservations are compatible with the object and purpose of the Covenant:[235] it does not follow that, by its very nature, a general reservation bearing on one of the protected rights would be invalid as such.[236]

101. Likewise, in the case of the 1989 Convention on the Rights of the Child, a great many reservations have been made to the provisions concerning adoption.[237] As has been noted by an author hardly to be suspected of "anti-human-rightsism", "It would be difficult to conclude that this issue is so fundamental to the Convention as to render such reservations contrary to its object and purpose".[238]

102. Given the wide range of practice in the matter, the Special Rapporteur believes that draft guideline 3.1.12 on this delicate issue should be drafted in a flexible way to allow sufficient leeway for interpretation. It could read as follows:

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[232] General comment No. 24 cited above in note 227, para. 7. Cf. Hampson, working paper cited above in note 227, para. 50.

[233] Some authors have maintained that the reservations regime is completely incompatible with human rights. See Imbert, op. cit., note 63, p. 99 (p. 28 of English version), who does not share this radical view; Coccia, op. cit., note 34, p. 16; R. P. Anand, "Reservations to Multilateral Treaties", *Indian Journal of International Law, 1960*, p. 88; Imbert, op. cit., note 22, p. 249; and Schabas, op. cit., note 63, p. 41. See also the commentaries on Human Rights Committee general comment No. 24, by Elena A. Baylis, "General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties", *Berkeley Journal of International Law*, 1999, pp. 277-329; Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No. 24 (52)", *International and Comparative Law Quarterly, 1997*, pp. 390-412; Rosalind Higgins, Introduction to J. P. Gardner, ed., op. cit., note 162, pp. xvii-xxix; and Konstantin Korbelia, "New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights", *European Journal of International Law, 2002*, pp. 437-477.

[234] See, for example, the reservation of Malta to article 13 (on the conditions for the expulsion of aliens), to which no objection has been entered (see *Multilateral Treaties* ... cited above in note 217, vol. I, p. 176).

[235] See general comment No. 24, paras. 8-10: these criteria, beyond that of the compatibility of a reservation with the object and purpose of the Covenant, have to do with the customary, peremptory or non-derogable nature of the norm in question; see below, paras. 116-144.

[236] See, however, below, note 239.

[237] Articles 20 and 21. See *Multilateral Treaties* ... cited above in note 217, vol. I, pp. 296-305.

[238] Schabas, op. cit., note 195, p. 480.

3.1.12 Reservations to general human rights treaties

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility of the rights set out therein, the importance that the right which is the subject of the reservation has within the general architecture of the treaty, and the seriousness of the impact the reservation has upon it.

(iii) Reservations relating to the application of domestic law

103. Another question frequently arises, and does so not only in the area of human rights: can a State formulate a reservation in order to safeguard the application of its domestic law?[239] Here again, a nuanced response is essential and it is certainly not possible to respond categorically in the negative, as would seem to be suggested by certain objections to reservations of this type. For instance, several States have objected to the reservation made by Canada to the Convention on the Environmental Impact Assessment in a Transboundary Context of 25 February 1991, on the grounds that the reservation "renders compliance with the provisions of the Convention dependent on certain norms of Canada's internal legislation".[240] Similarly, Finland objected to reservations made by several States to the 1989 Convention on the Rights of the Child on the "general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty".[241]

104. This ground for objection is unconvincing. Doubtless, in accordance with article 27 of the Vienna Convention,[242] no party may invoke the provisions of its domestic law as justification for failure to apply a treaty.[243] The assumption, however, is that the problem is settled, in the sense that the provisions in question are applicable to the reserving State; but that is precisely the issue. As has been correctly pointed out, a State very often formulates a reservation *because* the treaty

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[239] In its concluding comments of 6 April 1995 on the initial report of the United States, the Human Rights Committee "regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant" (CCPR/C/79/Add.50, para. 14). See the analysis by Schabas, op. cit., note 200, pp. 277-328, or Jeremy McBride, "Reservations and the Capacity of States to Implement Human Rights Treaties" in J. P. Gardner, ed., op. cit., note 162, p. 172.

[240] See the objection by Spain, as well as those by France, Norway, Ireland, Luxembourg and Sweden in *Multilateral Treaties* ... cited above in note 217, vol. II, pp. 434-436.

[241] Objections to the reservations of Indonesia, Malaysia, Qatar, Singapore and Oman, in *Multilateral Treaties* ... cited above in note 217, vol. I, pp. 306-307. See also, for example, the objections of Denmark, Finland, Greece, Ireland, Mexico, Norway and Sweden to the second reservation of the United States to the Convention on the Prevention and Punishment of the Crime of Genocide, in ibid., pp. 127-129; for the text of the reservation itself, see below, para. 112. See also below, para. 110.

[242] Expressly invoked, for instance, by Estonia and the Netherlands to support their objections to this same reservation by the United States, in *Multilateral Treaties* ... vol. I, p. 128.

[243] In the words of article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46" (which has to do with "imperfect ratifications"). The rule set out in article 26 of the Convention concerns treaties in force; whereas, by definition, a reservation purports to exclude or to modify the legal effect of the provision in question in its application to the author of the reservation.

imposes on it obligations incompatible with its domestic law, which it is not in a position to amend,[244] at least initially.[245] Moreover, article 64 of the European Convention on Human Rights does not simply authorize a State party to formulate a reservation where its internal law is not in conformity with a provision of the Convention, but restricts even that authority exclusively to instances where "a law ... in force in its territory is not in conformity with the provision".[246] On the other hand, this same article expressly prohibits "reservations of a general character".

105. What matters here is that the State or international organization formulating the reservation should not use its domestic law[247] as a cover for not actually accepting any new international obligation even though a treaty would have it change its practice. While article 27 of the Vienna Convention on the Law of Treaties cannot rightly be said to apply to the case in point,[248] it should nevertheless be borne in mind that national laws are "merely facts" from the standpoint of international law[249] and that the very aim of a treaty can be to lead States to modify them.

106. Although it might seem self-evident, it would no doubt be appropriate to establish this clearly in a draft guideline, 3.1.11:

> "*3.1.11 Reservations relating to the application of domestic law*
>
> *A reservation by which a State or an international organization purports to exclude or to modify the application of a provision of a treaty in order to*

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[244] See Schabas, op. cit., note 195, pp. 479-480 and op. cit., note 63, p. 59.

[245] Sometimes the reserving State indicates the period of time it will need to bring its domestic law into line with the treaty (as in the case of Estonia's reservation to the application of article 6, or Lithuania's to article 5, para. 3, of the European Convention on Human Rights, which gave one-year time limits (http://conventions.coe.int/)), or it indicates its intention to do so (as in the case of the reservations Cyprus and Malawi made upon accession to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, commitments which were in fact kept – see *Multilateral Treaties* ... cited above in note 217, vol. I, p. 261, note 25 and p. 263, note 39; see also Indonesia's statement upon accession to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 22 March 1989, in ibid., vol. II, p. 448). It is also not unusual for a State to withdraw a reservation made without any time indication after it has amended the provisions of its national law that had prompted the reservation: as in the case of the withdrawal by France, Ireland and the United Kingdom of several reservations to the Convention on the Elimination of All Forms of Discrimination against Women (see ibid., vol. I, p. 262, notes 28 and 32 and pp. 265-266, note 55), cf. the successive partial withdrawals (1996, 1998, 1999, 2001) by Finland of its reservation to article 6, para. 1, of the European Convention on Human Rights (http://conventions.coe.int/). Such practices are laudable and should definitely be encouraged (see guideline 2.5.3 in the Guide to Practice and the commentary to it, in the *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10, pp. 207-209)); yet they cannot be used as an argument for the invalidity of the principle of reservations on the grounds of domestic law.

[246] See above, para. 42.

[247] The Special Rapporteur considers it a given that there is a "proper law" of international organizations which, at least as regards the point at issue here, must, mutatis mutandis, be considered in the same light as the domestic law of States.

[248] See para. 104 above.

[249] Judgment of 25 May 1926, *Polish Upper Silesia* case, series A, No. 7, p. 19; see also Arbitration Commission for Yugoslavia, Opinion No. 1 of 29 November 1991, in *Revue Générale de Droit International Public* (RGDIP), 1992, p. 264. The principle is confirmed in article 4 of the Commission's 2001 draft articles on responsibility of States for internationally wrongful acts.

preserve the integrity of its domestic law may be formulated only if it is not incompatible with the object and purpose of the treaty."

(iv) Vague and general reservations

107. Article 19 (c) of the Vienna Convention does not expressly refer to such reservations. Yet a general reservation must be deemed to be incompatible with the object and purpose of the Convention. The object of reservations, by their very definition, is to exclude or to modify "the legal effect of *certain provisions* of the treaty in their application" to their authors.[250]

108. Thus, it cannot be maintained that the effect of reservations could possibly be to prevent a treaty as a whole from producing its effects. And, although "across-the-board" reservations are common practice, they are, as specified in draft guideline 1.1.1 of the Guide to Practice,[251] valid only if they purport "to exclude or modify the legal effect ... of the treaty as a whole *with respect to certain specific aspects* ...". Furthermore, it follows from the inherently consensual nature of the law of treaties in general,[252] and the law of reservations in particular,[253] that although States are free to *formulate* (not to *make*)[254] reservations, the other parties must be entitled to react by accepting the reservation or objecting to it. That is not the case if the text of the reservation does not allow its scope to be assessed.

109. Consequently, a reference to the domestic law of the reserving State is not per se the problem — there are indeed reservations of this kind that give rise to no

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[250] See the comments of the Israeli Government on the Commission's first draft on the law of treaties, which caused the English text of the definition of reservations to be brought into line with the French text by changing the word "some" to "certain" (in Sir Humphrey Waldock, fourth report (A/CN.4/177, cited above in note 20, p. 15). See also Chile's statement at the United Nations Conference on the Law of Treaties, *Official Records of the United Nations Conference on the Law of Treaties, second session, Vienna, 9 April to 22 May 1969*, summary records of plenary meetings and of meetings of the plenary Committee (A/CONF.39/11/Add.1) cited in note 60 above, p. 21, fourth plenary meeting, para. 5: "the words 'to vary the legal effect of certain provisions of the treaty' (subparagraph (d)) meant that the reservation must state clearly what provisions it related to. Imprecise reservations must be avoided."

[251] See above, note 101. See also the comments of Riquelme Cortado, op. cit., note 27, p. 172.

[252] See Reuter, op. cit., note 28, pp. 20-21; Tomuschat, op. cit., note 55, p. 466. See also, for example, Permanent Court of International Justice, judgment of 17 August 1923, *The S.S. "Wimbledon"* case, series A, No. 1, p. 25, or International Court of Justice advisory opinion of 11 July 1950 on the *International status of South-West Africa, I.C.J. Reports 1950*, p. 139.

[253] The International Court of Justice specified in this connection in its advisory opinion of 1951 on *Reservations to the Genocide Convention* that "it is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto" (*I.C.J. Reports 1951*, p. 21). The authors of the joint dissenting opinion accompanying the advisory opinion express this idea still more strongly: "The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later" (p. 32). See also the arbitral judgement of 30 June 1977 in the *Mer d'Iroise continental shelf* case, paras. 60 and 61, in *Reports of International Arbitral Awards*, vol. XVIII; and Bishop, op. cit., note 96, p. 255.

[254] See para. 14 above.

objections and have in fact not met with objections;[255] the problem lies in the frequent vagueness and generality of the reservations referring to domestic law, which make it impossible for the other States parties to take a position on them. That was the thinking behind an amendment submitted by Peru at the Vienna Conference seeking to add the following subparagraph (d) to future article 19, of the Convention:

> "(d) The reservation renders the treaty inoperative by making its application subject, in a general and indeterminate manner, to national law".[256]

110. Finland's objections to the reservations of several States parties to the 1989 Convention on the Rights of the Child are certainly more solidly reasoned on that ground than by a reference to article 27 of the 1969 Vienna Convention;[257] for instance, in response to the reservation by Malaysia, which had accepted a number of the provisions of the 1989 Convention "only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia",[258] Finland considered that the "broad nature" of that reservation left open "to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention."[259] Thailand's interpretative

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[255] See, for example, Mozambique's reservation to the International Convention against the Taking of Hostages of 17 December 1979, in *Multilateral Treaties* ... cited above in note 217, vol. II, p. 109 (a reservation regarding the extradition of Mozambican nationals that reappears in connection with other treaties such as, for example, the International Convention for the Suppression of the Financing of Terrorism, in ibid., p. 151); the reservations by Guatemala and the Philippines to the 1962 Convention on Consent for Marriage, Minimum Age for Marriage and Registration of Marriages, in ibid., p. 91; or the reservations by Colombia (made upon signature), Iran and the Netherlands (though very vague) to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, in ibid., vol. I, pp. 429-431. France's reservation to article 15, paragraph 1, of the European Convention on Human Rights has given rise to more discussion: see Nicole Questiaux, "La Convention européenne des droits de l'homme et l'article 16 de la Constitution du 4 october 1958", *Revue des Droits Humains 1970*, pp. 651-663; Alain Pellet, "La ratification par la France de la Convention européenne des droits de l'homme", *Revue de droit public 1974*, pp. 1358-1365; or Vincent Coussirat-Coustère, "La réserve française à l'article 15 de la Convention européenne des droits de l'homme", *Journal de droit international 1975*, pp. 269-293.

[256] Reports of the Plenary Commission (A/CONF.39/14), *Documents of the Conference* (A/CONF.39/11/Add.2), cited above in note 28, p. 134, para. 177; see the explanations of the representative of Peru at the Conference, 21st plenary meeting, 10 April 1968, *Summary records* (A/CONF.39/11/Add.1), cited above in note 60, p. 109, para. 25. The amendment was rejected by 44 votes to 16 with 26 abstentions (*Summary records*, p. 135, 25th plenary meeting of 16 April 1968, para. 26); a reading of the debate gives little explanation for the rejection: no doubt a number of delegations, like Italy, considered it "unnecessary to state that case expressly, since it was a case of reservations incompatible with the object of the treaty" (ibid., 22nd plenary meeting, 10 April 1968, p. 120, para. 75); along these same lines, see Szafarz, op. cit., note 84, p. 302.

[257] See para. 103 above. Similarly, the reason given by the Netherlands and the United Kingdom in support of their objections to the second United States reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, namely, that it created "uncertainty as to the extent of the obligations the Government of the United States of America is prepared to assume with regard to the Convention" (*Multilateral Treaties* ... cited above in note 217, vol. I, pp. 128-129) is more convincing than the argument based on an invocation of domestic law (see above, notes 242 and 243).

[258] *Multilateral Treaties* ... vol. I, p. 301.

[259] Ibid., p. 306. See also the objections by Finland and several other States parties to comparable reservations by several other States, ibid., pp. 307-310.

declaration to the effect that it "does not interpret and apply the provisions of this Convention [the 1966 International Convention on the Elimination of All Forms of Racial Discrimination] as imposing upon the Kingdom of Thailand any obligation beyond the confines of [its] Constitution and [its] laws"[260] also prompted an objection on the part of Sweden that, in so doing, Thailand was making the application of the Convention subject to a general reservation which makes reference to the limits of national legislation the content of which is not specified.[261]

111. The so-called "Sharia reservation"[262] gives rise to the same objection, a case in point being the reservation by which Mauritania approved the 1979 Convention on the Elimination of All Forms of Discrimination against Women "in each and every one of its parts which are not contrary to Islamic Sharia and are in accordance with our Constitution".[263] Here again, the problem lies not in the very fact that Mauritania is invoking a law of religious origin which it applies,[264] but, rather that as Denmark noted, "the general reservations with reference to the provisions of Islamic law are of unlimited scope and undefined character".[265] Thus, as the United Kingdom put it, such a reservation "which consists of a general reference to national

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[260] Ibid., p. 140.

[261] Not yet published: see http://untreaty.un.org/. Cf. the Norwegian and Swedish objections of 15 March 1999, which follow the same line of thinking with regard to Bangladesh's reservation to the Convention on the Political Rights of Women of 31 March 1953, in *Multilateral Treaties* ... cited above in note 217, vol. II, pp. 83-84, or the objections by Finland to a reservation by Guatemala to the Vienna Convention on the Law of Treaties and by the Netherlands, Sweden and Austria to a comparable reservation by Peru to the same Convention, in ibid., pp. 330-333 and 337.

[262] For a discussion of the various schools of thought, see especially Andrea Sassi, "General Reservations to Multilateral Treaties" in T. Treves, ed., op. cit., note 66, pp. 96-99. With regard specifically to the application of the reservation to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, see Clark, op. cit., note 201, pp. 299-302 and 310-311; Jane Connors, "The Women's Convention in the Muslim World" in J. P. Gardner, ed., op. cit., note 162, pp. 85-103; Cook, op. cit., note 201, pp. 690-692; McBride, op. cit., note 239, pp. 149-156 (with a great many examples) or Y. Tyagi, "The Conflict of Law and Policy on Reservations to Human Rights Treaties", *British Yearbook of International Law 2000*, pp. 198-201 and, more specifically, Anna Jenefsky, "Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Maryland Journal of International Law and Trade, 1991*, pp. 199-233.

[263] *Multilateral Treaties* ... cited above in note 217, vol. I, p. 237. See also the reservations by Saudi Arabia (citing "the norms of Islamic law") in ibid., p. 239 and by Malaysia (ibid., p. 236), or again the initial reservation by Maldives: "The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded" (ibid., p. 263, note 42); the latter reservation having elicited several objections, the Maldivian Government modified it in a more restrictive sense, but Germany once again objected to it and Finland criticized the new reservation (ibid., pp. 263-264). Likewise, several States formulated objections to the reservation by Saudi Arabia to the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, which made the application of its provisions subject to the condition that "these do not conflict with the precepts of the Islamic *Shariah*" (ibid., pp. 139 and 142-147).

[264] The Holy See ratified the 1989 Convention on the Rights of the Child provided that "the application of the Convention be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law ..." (*Multilateral Treaties* ... cited above in note 217, vol. I, p. 299). As has been pointed out (Schabas, op. cit., note 195, pp. 478-479), this text raises, mutatis mutandis, the same problems as the "Sharia" reservation.

[265] *Multilateral Treaties* ... cited above in note 217, vol. I, p. 244.

law without specifying its contents does not clearly define for other States Parties to the Convention the extent which the reserving State has accepted the obligations of the Convention".[266]

112. The same applies when a State reserves the general right to have its constitution prevail over a treaty,[267] as for instance in the reservation by the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide:

> "... Nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."[268]

113. Basically, it is the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, rather than the certainty that they are incompatible, which makes them fall within the purview of article 19 (c) of the Convention on the Law of Treaties. As the Human Rights Committee pointed out:

> "Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto."[269]

114. The European Court of Human Rights as well, in the *Belilos* case, declared invalid the interpretative declaration (equivalent to a reservation) by Switzerland on article 6, paragraph 1, of the European Convention on Human Rights because it was "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope".[270] But it is unquestionably the European Commission on Human Rights that most clearly formulated the principle applicable here when it

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[266] Ibid., p. 258. See also the objections by Austria, Finland, Germany, Norway, the Netherlands, Portugal and Sweden (ibid., pp. 242-258). The reservations of many Islamic States to specific provisions of the Convention, on the grounds of their incompatibility with the sharia, are certainly less criticizable on that basis, although a number of them also drew objections from some States parties. (For example, whereas Clark, op. cit., note 201, p. 300, observes that Iraq's reservation to article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, based on the sharia, is specific and entails a regime more favourable than that of the Convention, this reservation nonetheless elicited the objections of Mexico, the Netherlands and Sweden (see *Multilateral Treaties* ... cited above in note 217, vol. I, pp. 250-253 and 256-258).)

[267] See Pakistan's reservation to the Convention on the Elimination of All Forms of Discrimination against Women, in *Multilateral Treaties* ... cited above in note 217, vol. I, p. 238 and the objections made by Austria, Finland, Germany, Netherlands and Norway in ibid., pp. 242, 246, 248, 252 and 254 and by Portugal in ibid., p.265, note 50.

[268] Ibid., p. 126.

[269] General comment No. 24 (cited above in note 227), para. 19; see also para. 12, which links the issue of the invocation of domestic law to that of widely formulated reservations.

[270] Judgment of 29 April 1988, *Belilos*, cited above in note 98, p. 25, para. 55 — see above in para. 42. For an in-depth analysis of the condition of generality raised by article 57 of the Convention, see especially Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: the Belilos Case", *German Yearbook of International Law 1990*, pp. 97-109, and R. J. Stuart MacDonald "Reservations Under the European Convention on Human Rights", *Revue Belge de Droit International, 1988*, pp. 433-438 and 443-448.

judged that "a reservation is of a general nature ... when it is worded in such a way that it does not allow its scope to be determined".[271]

115. Draft guideline 3.1.7 could be worded along these lines:

3.1.7 Vague, general reservations

A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty.

(v) Reservations relating to provisions embodying customary norms

116. In some cases, States parties to a treaty have objected to reservations and challenged their compatibility with its object and purpose under the pretext that they were contrary to well-established customary norms. Thus, Austria declared that it was

> "... of the view that the Guatemalan reservations [to the 1969 Vienna Convention on the Law of Treaties] refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the [said Convention] ..."[272]

Similarly, the Netherlands objected to the reservations formulated by several States in respect of various provisions of the 1961 Vienna Convention on Diplomatic Relations and took "the view that this provision remains in force in relations between it and the said States in accordance with international customary law".[273]

117. It has often been thought that this inability to formulate reservations to treaty provisions which codify customary norms could be deduced from the International Court of Justice's judgement in the *North Sea Continental Shelf* cases:[274]

> "... speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; — whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international

[271] Report of the Commission, 5 May 1982, *Temeltasch* case, cited above in note 99, para. 84. See Imbert, op. cit., note 95, pp. 599-607.

[272] *Multilateral Treaties* ... cited above in note 217, vol. II, p. 330; see also the objections formulated in similar terms by Belgium, Denmark, Finland, Germany, Sweden and the United Kingdom (ibid., pp. 345-351). In the *Mer d'Iroise* case, the United Kingdom maintained that France's reservation to article 6 of the Convention on the Continental Shelf was aimed at "the rules of customary international law" and was "inadmissible as a reservation to article 6" (*Reports of International Arbitral Awards* (RIAA) cited above in note 90, vol. XVIII, p. 38, para. 50.

[273] Ibid., vol. I, p. 96; in reality, it is not the provisions in question that remain in force, but rather the rules of customary law that they express (see below, para. 120). See also Poland's objections to Bahrain's and Libya's reservations (ibid., p. 95) and D. W. Greig, op. cit., note 29, p. 88.

[274] See the dissenting opinion of Judge Morelli, appended to the 1969 judgement (*ICJ Reports 1969*, pp. 198-199) and the many commentaries cited by P.-H. Imbert, op cit., note 22, p. 244, note 20; see also G. Teboul, op. cit., note 150, p. 685.

> community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour."[275]

While the wording adopted by the Court is certainly not the most felicitous, the conclusion that some have drawn from it seems incorrect if this passage is put back into its context.

118. The Court goes on to exercise caution with respect to the deductions called for by the exclusion of certain reservations. Noting that the faculty of reservation to article 6 of the 1958 Geneva Convention on the Continental Shelf (delimitation) was not excluded by article 12 on reservations,[276] as it was in the case of articles 1 to 3, the Court considered it "normal" and

> "a legitimate inference that it was considered to have a different and less fundamental status and not, like those articles, to reflect pre-existing or emergent customary law".[277]

Thus, it is not true that the Court affirmed the inadmissibility of reservations in respect of customary law;[278] it simply stated that, in the case under consideration, the different treatment which the authors of the Convention accorded to articles 1 to 3, on the one hand, and article 6, on the other, suggested that they did not consider that the latter codified a customary norm which, moreover, confirms the Court's own conclusion.

119. Furthermore, the judgement itself states, in an often-neglected *dictum*, that "no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention [on the Continental Shelf] ..."[279] Judge Morelli, dissenting, does not contradict this when he writes: "Naturally the power to make reservations affects only the contractual obligation flowing from the convention ... It goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified."[280] This clearly implies that the customary nature of the norm reflected in a treaty provision in respect of which a reservation is formulated does not in itself constitute grounds for invalidating the reservation: "the faculty of making reservations to a treaty provision has no necessary connection with the question

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[275] Judgement of 20 February 1969, *ICJ Reports 1969*, pp. 38-39, para. 63.

[276] See above, para. 39.

[277] *ICJ Reports 1969*, p. 40, para. 66. In support of this position, see the individual opinion of Judge Padilla Nervo, ibid., p. 89; against it, see the dissenting opinion of Judge Koretsky, p. 163.

[278] P.-H. Imbert, op. cit., note 22, p. 244; and, in the same vein, Alain Pellet, "La C.I.J. et les réserves aux traités: Remarques cursives sur une révolution inachevée", *Liber Amicorum Judge Shigeru Oda*, Kluwer Law International, The Hague, 2002, pp. 507-508. In his dissenting opinion, Judge Tanaka takes the opposing position with respect to "the application of the provision for settlement by agreement, since this is required by general international law, notwithstanding the fact that article 12 of the Convention does not expressly exclude article 6, paragraphs 1 and 2, from the exercise of the reservation faculty" (*ICJ Reports 1969*, p. 182); this confuses the question of the faculty to make a reservation with that of the reservation's effects, where the provision that the reservation concerns is of a customary, and even a peremptory, nature. (Strangely, Judge Tanaka considers that the equidistance principle "must be recognized as *jus cogens*" — ibid.)

[279] *ICJ Reports 1969*, p. 40, para. 65.

[280] Ibid., p. 198.

whether or not the provision can be considered as expressing a generally recognized rule of law".[281]

120. Moreover, although this principle is sometimes challenged,[282] it is recognized in the preponderance of doctrine,[283] and rightly so:

- Customary norms are binding on States, independently of their expression of consent to a conventional rule[284] but, unlike the case of peremptory norms, States may opt out by agreement *inter se*; it is not clear why they could not do so through a reservation[285] — providing that the latter is valid — but this is precisely the question raised;

- A reservation concerns only the expression of the norm in the context of the treaty, not its existence as a customary norm, even if, in some cases, it may cast doubt on the norm's general acceptance "as of right";[286] as the United Kingdom remarked in its observations on General Comment No. 24, "there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law";[287]

- If this nature is clear, States remain bound by the customary norm, independently of the treaty;[288] and

- Appearances to the contrary, there may be an interest (and not necessarily a laudable one) involved — for example, that of avoiding application to the relevant obligations of the monitoring or dispute settlement mechanisms envisaged in the treaty or of limiting the role of domestic judges, who may

[281] Dissenting opinion of ad hoc Judge Sørensen, ibid., p. 248.

[282] See the position taken by Briggs in the declaration which he attached to the arbitral award of 30 June 1977 in the *Mer d'Iroise* case, cited above in note 90, p. 262.

[283] See M. Coccia, op. cit., note 34, pp. 31-32; G. Gaja, "Le reserve al Patto sui diritti civili e politici e il diretto consuetudinario", *Rivista di diritto internazionale*, 1996, pp. 451-452; P.-H. Imbert, op. cit., note 113, p. 48; R. Riquelme Cortado, op. cit., note 27, pp. 159-171; and L. Sucharipa-Behrman, op. cit., note 202, pp. 76-77.

[284] Cf. Finland's objection to Yemen's reservations to article 5 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination: "By making a reservation a State cannot contract out from universally binding human rights standards [but this is true as a general rule]", objection cited above in note 218, p. 147.

[285] In that regard, see the dissenting opinion of ad hoc Judge Sørenson in the *North Sea Continental Shelf* cases, cited above in note 281, p. 248, and M. Coccia, op. cit., note 34, p. 32; see, however, below, para. 132.

[286] Cf. article 38, para. 1 (b), of the Statute of the International Court of Justice. In that regard, see R. R. Baxter, "Treaties and Customs", RCADI 1970-I, vol. 129, p. 50; M. Coccia, op. cit., note 34, p. 31; G. Gaja, op. cit., note 283, p. 451; and G. Teboul, op. cit., note 150, pp. 711-714. Under certain (but not all) circumstances, the same may be true of the existence of a reservation clause (cf. P.-H. Imbert, op cit., note 22, p. 246, and P. Reuter, op. cit., note 45, p. 631 (or pp. 370-371), note 16).

[287] Report of the Human Rights Committee to the General Assembly, 1995, A/50/40, vol. I, p. 132, para. 7.

[288] See below, paras. 126-127.

have different competences with respect to conventional rules on the one hand, and customary rules, on the other;[289]

- Furthermore, as noted by France in its observations on General Comment No. 24 of the Human Rights Committee, "the State's duty to observe a general customary principle should [not] be confused with its agreement to be bound by the expression of that principle in a treaty, especially with the developments and clarifications that such formalization involves";[290]

- And, lastly, a reservation may be the means by which a "persistent objector" manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a norm which cannot be invoked against it under general international law.[291]

121. Here again, however, the question is whether this solution can be transposed to the field of human rights.[292] The Human Rights Committee challenged this view on the basis of the specific characteristics of human rights treaties:

> "Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction."[293]

122. First, it should be noted that the Committee confirmed that reservations to customary norms are not excluded *a priori*. In arguing to the contrary in the specific case of human rights treaties, it simply notes that these instruments are designed to protect the rights of individuals. But this premise does not have the consequences that the Committee attributes to it[294] since, on the one hand, a reservation to a human rights treaty provision which reflects a customary norm in no way absolves the reserving State of its obligation to respect the norm as such[295] and, on the other,

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[289] Such is the case in France, where treaties (under article 55 of the Constitution), but not customary norms, take precedence over laws; see the 20 October 1989 decision by the Assembly of the French Council of State in the *Nicolo* case, *recueil Lebon*, p. 748, Frydman's conclusions, and the 6 June 1997 decision in the *Aquarone* case, *recueil Lebon*, p. 206, Bachelier's conclusions.

[290] Report of the Human Rights Committee to the General Assembly, 1996, A/51/40, vol. I, p. 102, para. 5; in the same vein, see the comment by the United States of America (ibid., 1995, A/50/40, vol. I, p. 127). See also Gérard Cohen-Jonathan, "Les réserves dans les traités de droits de l'homme", *RGDIP* 1966, pp. 932-933.

[291] See V. F. Hampson's working paper, cited above in note 227, note 45.

[292] V. A. Pellet, Second report on reservations to treaties, A/CN.4/477/Add.1, paras. 143-147.

[293] General Comment No. 24, cited above in note 227, para. 8.

[294] For an opposing view, see Thomas Giegerich, "Vorgehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültikeit und Prüfungskompetenzen von Vertragsgremien — Ein konstitutioneller Ansatz", *ZaöRV* 1995, p. 744 (English Summary, pp. 779-780).

[295] See above, para. 120. According to the Human Rights Committee, "a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language" (General Comment No. 24, cited above in note 227, para. 8). This is certainly true, but it does not automatically mean that reservations to the relevant provisions of the Covenant are prohibited; if these rights must be respected, it is because of their customary and,

in practice, it is quite likely that a reservation to such a norm (especially if the latter is peremptory) will be incompatible with the object and purpose of the treaty by virtue of the applicable general rules,[296] but that is another problem.

123. On the more general issue of codification conventions, it might be wondered whether reservations to them are not incompatible with their object and purpose. There is no doubt that the desire to codify is normally accompanied by a concern to preserve the rule being affirmed:[297] if it were possible to formulate a reservation to a provision of customary origin in the context of a codification treaty, the codification treaty would fail in its objectives,[298] to the point that reservations and, at all events, multiple reservations, have been viewed as the very negation of the work of codification.[299]

124. This does not mean that, in essence, any reservation to a codification treaty is incompatible with its object and purpose:

- It is certain that reservations are hardly compatible with the desired objective of standardizing and clarifying customary law but, on reflection, the overall balance which the reservation threatens is not the object and purpose of the treaty itself, but the object and purpose of the negotiations which gave rise to the treaty;[300]
- The very concept of a "codification convention" is tenuous. As the Commission has often stressed, it is impossible to distinguish between the codification *stricto sensu* of international law and the progressive development

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in some cases, peremptory nature, not because of their inclusion in the Covenant. For a similar view, see G. Gaja, op. cit., note 283, p. 452. Furthermore, the Committee simply makes assertions; it does not justify its identification of customary rules attached to these norms; in another context, it has been said that "[t]he 'ought' merges with the 'is', the *lex ferenda* with the *lex lata*" (T. Meron, "The Geneva Conventions as Customary Norms", *AJIL* 1987, p. 55; see also W. A. Schabas' well argued critique concerning articles 6 and 7 of the Covenant, op. cit., note 200, pp. 296-310).

[296] In that regard, see Françoise Hampson's working paper on reservations to human rights treaties, E/CN.4/Sub.2/1999/28, para. 17 and her final working paper on that topic, E/CN.4/Sub.2/2004/42; cited above in note 227, para. 51: "In theory, a State may make a reservation to a treaty provision without necessarily calling into question the customary status of the norm or its willingness to be bound by the customary norm. Nevertheless, in practice, reservations to provisions which reflect customary international law norms are likely to be viewed with considerable suspicion."

[297] P.-H. Imbert, op. cit., note 246; see also G. Teboul, op. cit., note 150, p. 680, who notes that while both are useful, the concept of a reservation is incompatible with that of a codification convention; this study gives a clear overview of the whole question of reservations to codification conventions (pp. 679-717, *passim*).

[298] P. Reuter, op. cit., note 45, pp. 630-631 (or p. 370). The author adds that, for this reason, the treaty would also give rise to a situation farther from its object and purpose than if it had not existed, since the scope of application of a general rule would be restricted (ibid.). This second statement is more debatable: it seems to assume that the reserving State, by virtue of its reservation, is exempt from the application of the rule; this is not the case (see below, note 307).

[299] R. Ago in *Yearbook ... 1965*, vol. I (797th meeting, 8 June 1965), p. 168, para. 58.

[300] G. Teboul, op. cit., note 150, p. 700.

thereof.[301] How many rules of customary origin must a treaty contain in order to be defined as a "codification treaty"?[302]

– The status of the rules included in a treaty changes over time: a rule which falls under the heading of "progressive development" may become pure codification and a "codification convention" often crystallizes into a rule of general international law a norm which was not of this nature at the time of its adoption.[303]

125. Thus, the nature of codification conventions does not, as such, constitute an obstacle to the formulation of reservations to some of their provisions on the same grounds (and with the same restrictions) as any other treaty and the arguments that can be put forward, in general terms, in support of the ability to formulate reservations to a treaty provision that sets forth a customary norm[304] are also fully transposable thereto. Furthermore, there is well established practice in this area: there are more reservations to human rights treaties (which are, moreover, to a great extent codifiers of existing law) and codification treaties than to any other type of treaty.[305] And while some objections may have been based on the customary nature of the rules concerned,[306] the specific nature of these conventions seems never to have been invoked in support of a declaration of incompatibility with their object and purpose.

126. Nevertheless, the customary nature of a provision which is the object of a reservation has important consequences with respect to the effects produced by the reservation; once established, it prevents application of the *conventional* rule which is the object of the reservation in the reserving State's relations with the other parties to the treaty, but it does not eliminate that State's obligation to respect the customary norm (the content of which may be identical).[307] The reason for this is

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[301] See, for example, the Commission's reports on its eighth (1956) and forty-seventh (1995) sessions, *Yearbook ...1956*, vol. II, p. 256, para. 26, and *Yearbook ...1996*, vol. II, pp. 92-93, paras. 156-157.

[302] P. Reuter, op. cit., note 45, p. 632 (or p. 371).

[303] See above, para. 83; on the issue of the death penalty from the point of view of articles 6 and 7 of the 1966 Covenant on Civil and Political Rights (taking a negative position), see William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?", *Brooklyn Journal of International Law* 1995, pp. 308-310.

[304] See above, para. 116.

[305] For example, on 31 December 2003, the Vienna Convention on Diplomatic Relations was the object of 57 reservations or declarations (of which 50 are still in force) by 34 States parties (currently, 31 States have reservations still in force) (*Multilateral Treaties* ... cited above in note 217), vol. I, pp. 90-100; and the 1969 Vienna Convention on the Law of Treaties was the subject of 70 reservations or declarations (of which 60 are still in force) by 35 States (32 at present) (ibid., vol. II, pp. 340-351). For its part, the 1966 Covenant on Civil and Political Rights, which (now, at least) seems primarily to codify the general international law currently in force, was the object of 218 reservations or declarations (of which 196 are still in force) by 58 States (ibid., pp. 173-184).

[306] See above, paras. 116 and 122.

[307] In support of this position, see Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th ed., Longman, Harlow, 1992, vol. II, p. 1244; G. Teboul, op. cit., note 150, p. 711; and Prosper Weil, "Vers une normativité relative en droit international?", *RGDIP* 1982, pp. 43-44. See also the authors cited above in note 281 or W. A. Schabas, op. cit., note 63, p. 56. Paul Reuter takes the opposing view, arguing that the customary norm no longer applies between the State that formulates a reservation and the parties that refrain from objecting to it since, through a conventional mechanism subsequent to the establishment of the customary rule,

simple and appears quite clearly in the famous *dictum* of the International Court of Justice in the *Nicaragua* case:

> "The fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions".[308]

127. Thus, the United States of America rightly considered, in its objection to the Syrian Arab Republic's reservation to the Vienna Convention on the Law of Treaties, that

> "the absence of treaty relations between the United States of America and the Syrian Arab Republic with regard to certain provisions in Part V will not in any way impair the duty of the latter to fulfil any obligation embodied in those provisions to which it is subject under international law independently of the Vienna Convention on the Law of Treaties".[309]

128. In his dissenting opinion appended to the 1969 judgement of the International Court of Justice in the *North Sea Continental Shelf* cases, ad hoc Judge Sørensen summarized the rules applicable to reservations to a declaratory provision of customary law as follows:

> "... the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law. To substantiate this opinion it may be sufficient to point out that a number of reservations have been made to provisions of the Convention on the High Seas, although this Convention, according to its preamble, is 'generally declaratory of established principles of international law'. Some of these reservations have been objected to by other contracting States, while other reservations have been tacitly accepted. The acceptance, whether tacit or express, of a reservation made by a contracting party does not have the effect of depriving the Convention as a whole, or the relevant article in particular, of its declaratory character. It only has the effect of establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention. Provided the customary rule does not belong to the category of jus cogens, a special contractual relationship of this nature is not invalid as such. Consequently, there is no incompatibility between the faculty of making reservations to certain articles of the Convention on the Continental Shelf and

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its application has been suspended (op. cit., note 45), pp. 630-631 (or p. 370); for a similar argument, see G. Teboul, op. cit., note 150, pp. 690 and 708. There are serious objections to this view; see below, para. 132.

[308] International Court of Justice judgement of 26 November 1984, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction of the Court and Admissibility of the Application), ICJ Reports 1984*, para. 73; see also Judge Morelli's dissenting opinion, ibid., p. 198.

[309] *Multilateral Treaties* ... cited above in note 217, vol. II, p. 345; see also above, notes 223-225, and the objections of the Netherlands and Poland, cited above, para. 116.

Conventions.[314] This reasoning, however, is far from clear;[315] above all, it regards the reservations mechanism as a purely treaty-based process, whereas a reservation is a *unilateral* act; although linked to the treaty, it has no exogenous effects. By definition, it "purports to exclude or to modify the legal effect of *certain provisions of the treaty* in their application" to the reserving State[316] and, if it is accepted, those are indeed its consequences;[317] however, whether or not it is accepted, "neighbouring" international law remains intact; the legal situation of interested States is affected by it only in their *treaty relations*.[318]

133. Other, more numerous authors assert the incompatibility of any reservation with a provision which reflects a peremptory norm of general international law, either without giving any explanation,[319] or arguing that such a reservation would, *ipso facto*, be contrary to the object and purpose of the treaty.[320]

134. This is also the position of the Human Rights Committee in its General Comment No. 24:

> "Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant".[321]

This formulation is debatable[322] and, in any case, cannot be generalized: it is perfectly conceivable that a treaty might refer marginally to a rule of *jus cogens* without the latter being its object and purpose.

135. It has, however, been asserted that the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts.[323] This is certainly true and, in fact, constitutes the only

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[314] "The validity of a reservation depends, under the Convention's system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty" (J. M. Ruda, op.cit. note 17, p.190).

[315] Its validity will be discussed in greater detail when the effects of reservations are discussed, probably in the eleventh report. In any case, it would certainly be politic for the Commission to avoid, insofar as possible, prejudging its own response to this very important and difficult issue.

[316] Article 2 (1) (d) of the Vienna Convention.

[317] Cf. article 21 of the Convention.

[318] Cf. above, para. 126.

[319] Cf., for example, R. Riquelme Cortado, op.cit., note 27, p. 147. See also A. Pellet, Second report on reservations to treaties, A/CN.4/477/Add.1, paras. 141-142.

[320] Cf. also the dissenting opinion of Judge Tanaka in the *North Sea Continental Shelf* cases, *ICJ. Reports 1969*, p. 182.

[321] General Comment cited above in note 227, para. 8. In its comments, France (cf. above note 290, p. 104, para. 2) argued with some justification that "paragraph 8 is drafted in such a way as to link the two distinct legal concepts: of 'peremptory norms' and rules of 'customary international law' to the point of confusing them".

[322] Cf. the doubts expressed on this subject by the United States of America which, in its commentary on General Comment No. 24, transposes to provisions which set forth peremptory norms the solution which is essential for those norms which formulate rules of customary law: "it is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations" (commentary cited above in note 290, p. 127).

[323] G. Teboul, op.cit. note 150, p. 707, note 52 referring to J.-D. Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", *Revue générale de droit international public (R.G.D.I.P.)* 1979, p. 663, and the legal writings quoted.

intellectually convincing argument for not transposing to reservations to peremptory provisions the reasoning that would not exclude, in principle, the ability to formulate reservations to treaty provisions embodying customary rules.[324]

136. When formulating a reservation a State may indeed seek to exempt itself from the rule to which the reservation itself relates and, in the case of a peremptory norm of general international law, this is out of the question[325] — all the more so because it is inconceivable that a persistent objector could thwart such a norm. The objectives of the reserving State, however, may be different: while accepting the content of the rule, it may wish to escape the consequences arising out of it, particularly in respect of monitoring,[326] and on this point, there is no reason why the reasoning followed in respect of customary rules which are merely binding should not be transposed to peremptory norms. However, as regrettable as this may seem, reservations do not have to be justified, and in fact, they seldom are. In the absence of clear justification, therefore, it is impossible for the other contracting parties or for monitoring bodies to verify the validity of the reservation, and it is best to adopt the principle that any reservation to a provision which formulates a rule of *jus cogens* is null and void *ipso jure*.

137. This conclusion, however, must be accompanied by two major caveats. Firstly, this prohibition does not result from article 19 (c) of the Vienna Convention but, mutatis mutandis, from the principle set out in article 53. Secondly, there are other ways for States to avoid the consequences of the inclusion in a treaty of a peremptory norm of general international law: they may formulate a reservation not to the substantive provision concerned, but to "secondary" articles governing treaty relations (monitoring, dispute settlement, interpretation), even if this means restricting its scope to a particular substantive provision.[327]

138. In appearance, the question of reservations to non-derogable clauses contained in human rights treaties is very similar.[328] States frequently justify their objections

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[324] This is true *a fortiori* if we consider the reservation/acceptance "pair" as an agreement amending the treaty in the relations between the two States concerned. Cf. M. Coccia, op. cit., note 34, pp. 30-31; this analysis, however, is unconvincing.

[325] There are, of course, few examples of reservations which are clearly contrary to a norm of *jus cogens*. Cf., however, the reservation formulated by Myanmar when it acceded, in 1993, to the 1989 Convention on the Rights of the Child. Myanmar reserved the right not to apply article 37 of the Convention and to exercise "powers of arrest, detention, imprisonment, exclusion, interrogation, enquiry and investigation" in respect of children, in order to "protect the supreme national interest" (*Multilateral treaties* ... cited above in note 217, vol. I, p. 314). This reservation, to which four States expressed objections (on the basis of referral to domestic legislation, not the conflict of the reservation with a peremptory norm), was withdrawn in 1993 (cf. *Multilateral treaties ... Status as at 31 December 1993*, ST/LEG/SER.E/11-12, pp. 209-211).

[326] Cf. above, para. 120.

[327] In this regard, cf. for example the reservations of Malawi and Mexico to the 1979 International Convention against the Taking of Hostages, subjecting the application of article 17 (dispute settlement and jurisdiction of the Court) to the conditions of their optional declarations pursuant to article 36 (2) of the Statute of the International Court of Justice, *Multilateral treaties* ... cited above in note 217, vol. II, p. 109. There can be no doubt that such reservations are not prohibited in principle; cf. above, para. 96.

[328] On this issue, cf. in particular: R. Riquelme Cortado, op. cit., note 27, pp. 152-159.

to such provisions on grounds of the treaty-based prohibition on suspending their application whatever the circumstances.[329]

139. Clearly, to the extent that non-derogable provisions relate to rules of *jus cogens*, the reasoning applicable to the latter applies also to the former.[330] However, the two are not necessarily identical.[331] According to the Human Rights Committee:

> "While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation."[332]

This last point is purely a *petitio principii*, which is undoubtedly motivated by legitimate reasons of convenience but is not based on any legal principle. The Commission could endorse this position, but it should bear in mind that it would then be involved in progressive development of international law, rather than codification *stricto sensu*.

140. Incidentally, it follows *a contrario* that, in the Committee's view, if a non-derogable right is not a matter of *jus cogens*, it can in principle be the object of a reservation. The Inter-American Commission on Human Rights declared in its advisory opinion of 8 September 1983 on the *Restrictions to the Death Penalty*:

> "Article 27 of the Convention allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed by article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court

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[329] Cf. article 4 (2) of the 1966 International Covenant on Civil and Political Rights, article 15 (2) of the European Convention on Human Rights (see also article 3 of Protocol No. 6, article 4 (3) of Protocol No. 7 and article 2 of Protocol No. 13), and article 27 of the American Convention on Human Rights. Neither the International Covenant on Economic, Social and Cultural Rights nor the African Charter of Human and Peoples' Rights contain clauses of this type (cf. Fatsah Ouguergouz, "L'absence de clauses de dérogation dans certains traités relatifs aux droits de l'homme", *R.G.D.I.P.* 1994, pp. 289-335).

[330] Cf. the Human Rights Committee's General Comment No. 24: "some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms [...] — the prohibition of torture and arbitrary deprivation of life are examples" (cited above in note 227, para. 10).

[331] Cf. the Human Rights Committee's General Comment No. 29, CCPR/C/21/Rev.1/Add.11, 24 July 2001, para. 11. Cf. also R. Riquelme Cortado, op. cit., note 27, pp. 153-155, or K. Teraya, "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights", *EJIL* 2001, pp. 917-947.

[332] General Comment No. 24, cited above in note 227, para. 10.

concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention."[333]

141. In opposition to any possibility of formulating reservations to a non-derogable provision, it has been argued that, when any suspension of the obligations in question is excluded by the treaty, "with greater reason one should not admit any reservations, perpetuated in time until withdrawn by the State at issue; such reservations are (...) without any caveat, incompatible with the object and purpose of those treaties".[334] This argument is not persuasive: it is one thing to prevent derogations from a binding provision, but another thing to determine whether a State is bound by the provision at issue.[335] It is this second problem that needs to be resolved.

142. It must therefore be accepted that, while certain reservations to non-derogable provisions are certainly ruled out — either because they would hold in check a peremptory norm, or because they would be contrary to the object and purpose of the treaty — this is not necessarily always the case.[336] The non-derogable nature of a right protected by a human rights treaty does not in itself prevent a reservation from being formulated, provided that it applies only to certain limited aspects relating to the implementation of the right in question; but it draws attention to its importance and constitutes a useful guide for assessing the criterion of the object and purpose of the treaty.

143. This balanced solution is well illustrated by Denmark's objection to the United States reservations to articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights:

> "Denmark would like to recall article 4, paragraph 2, of the Covenant, according to which no derogations from a number of fundamental articles, inter alia 6 and 7, may be made by a State Party even in time of public emergency which threatens the life of the nation.
>
> In the opinion of Denmark, reservation (2) of the United States with regard to capital punishment for crimes committed by persons below 18 years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, paragraph 2, of the Covenant such derogations are not permitted.
>
> Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations."[337]

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[333] Cited above in note 197, para. 61.

[334] Separate opinion of Augusto Cançado Trindade, appended to the decision of the Inter-American Court dated 22 January 1999 in the case of *Blake*, *Series C*, No. 27, para. 11; cf. the favourable comment by Riquelme Cortado, op. cit., note 27, p. 155. To the same effect, cf. the objection by the Netherlands, cited below, note 337.

[335] Cf. the comment by the United Kingdom on General Comment No. 24 of the Human Rights Committee: "Derogation from a formally contracted obligation and reluctance to undertake the obligation in the first place are not the same thing" (cited above in note 287, p. 131, para. 6).

[336] Cf. F. Hampson, working paper cited above, note 227, para. 52; Rosalyn Higgins, "Human Rights: Some Questions of Integrity", *Michigan L. Rev.* 1989, p. 15; J. McBride, op. cit. note 239, pp. 163-164; J. Polakiewicz, op. cit. note 27, p. 113 or C. J. Redgwell, op. cit., note 233, p. 402; *contra*: L. Lijnzaad, op. cit., note 84, p. 91.

[337] *Multilateral treaties* ... cited above in note 217, vol. 1, p. 182; cf. also, although they are less clearly based on the non-derogable nature of articles 6 and 7, the objections of Germany, Belgium, Finland, Italy, Norway, the Netherlands (which mentions that the United States

Denmark objected not because the United States reservations related to non-derogable rights, but because their wording was such that they left the essential provisions in question empty of any substance. It should be noted that in certain cases, States parties formulated no objection to reservations relating to provisions in respect of which no derogation is permitted.[338]

144. Naturally, the fact that a provision may in principle be the object of a derogation does not mean that all reservations relating to it will be valid.[339] The criterion of compatibility with the object and purpose of the treaty also applies to them.

145. This leads to several observations:

- Firstly, different principles apply in evaluating the validity of reservations, depending on whether they relate to provisions setting forth rules of *jus cogens* or to non-derogable rules;
- In the first case, all reservations are prohibited because they might threaten the integrity of the peremptory norm, the application of which (unlike that of customary rules, which permit derogations) must be uniform;
- In the second case, however, reservations remain possible provided they do not call into question the principle set forth in the treaty provision; in that situation, the methodological guidance contained in draft guideline 3.1.6[340] is fully applicable.

146. Given the fundamental distinction which must be made between these two cases, they should probably be dealt with in two separate draft guidelines:

3.1.9. Reservations to provisions setting forth a rule of jus cogens

A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law.

3.1.10 Reservations to provisions relating to non-derogable rights

A State or an international organization may formulate a reservation to a treaty provision relating to non-derogable rights provided that the reservation in question is not incompatible with the essential rights and obligations arising out of that provision. In assessing the compatibility of the reservation with the object and purpose of the provision in question, account must be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

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reservation to article 7 "has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogation, not even in times of public emergency, are permitted"), Portugal or Sweden, ibid., pp. 181-186.

338 Cf. the many examples given by W. A. Schabas relating to the 1966 International Covenant on Civil and Political Rights and the European and Inter-American human rights treaties, op. cit., note 63, pp. 51-52, note 51.

339 Cf. C. J. Redgwell, op. cit., note 233, p. 402.

340 "Determination of the compatibility of a reservation with the object and purpose of a treaty"; cf. above, para. 91.